United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

77-7209

United States Court of Appeals
For the Second Circuit

IRVING ELLENTUCK et al.,
Plaintiffs-Appellants,

-against-

JOSEPH B. KLEIN et al.,
Defendants-Appellees.

On Appeal from a Judgment of the
District Court, Southern District of New York

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

DORA ABERLIN
Attorney for Appellants
150 Nassau Street
New York, New York 10038
BA 7-8339

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Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel. (212) 447-5358

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REPLY BRIEF OF PLAINTIFFS APPELLANTS

POINT I

THE DISTRICT COURT ERRED IN FAILING TO DISTINGUISH BETWEEN A VOID AND A VOIDABLE JUDGMENT

This appeal is grounded on the error of the District Court in failing to distinguish between a void and a voidable judgment.

The Appellees in their answering briefs fall into that same error.

The essential facts upon which plaintiffs' case is predicated are:

1. The subject building is a frame wooden building. This is a fact which cannot be controverted, which appellees have never even tried to controvert and which has been accepted by the Appellate Division, Second Department in its first decision dated April 29, 1974 (55A) where the opinion refers to the building as a "frame" dwelling.

2. The building when Kimball purchased it had already lost its standing as a heretofore converted building and had reverted to its original one family status.

This fact was controverted in the first plenary suit brought by plaintiffs to vacate Kimball's illegal permit, was thoroughly litigated in that action and decided against Kimball in the April 29, 1974 (55A) decision of the Appellate Division, wherein that Court refers to the building as a "single family dwelling" and finds that the "evidence" is "overwhelming" and that "the evidence clearly established that the

Class B classification was clearly abandoned by the Sisters "conforming usage from 1952 until the 1974 transfer to Kimball".

This decision was never appealed to the Court of Appeals by Kimball, although since it was a reversal, he could have gone to the Court of Appeals as a matter of right.

Whatever changes in its opinion the Appellate Division may have made in its second decision dated March 1, 1976 (59A-60A) the finding that the Sisters had abandoned the building's converted Multiple B status and that the building had thus reverted to its original one family status has never been changed or reversed, nor could it be by any court. On that point the April 29, 1974 decision of the Appellate Division is absolutely final, and binding, to wit, that at the time Kimball purchased the premises and when he applied for a variance, the building, a wooden frame house was a one-family dwelling.

Furthermore, the fact that Kimball applied for a variance is itself an admission that the building could no longer be considered a multiple dwelling of any kind.

Under the law, the Board of Standards and Appeals had and has absolutely no jurisdiction to permit the conversion of a single family wooden frame building to a multiple dwelling of any kind. (Point III of Appellants' Principal brief).

Had the subject building been brick, the BSA might have had discretion in the matter, but it was not brick and the prohibition against conversion of a wooden frame building to a multiple dwelling is absolute. As our Supreme Court ruled in the case of Texas & N.O.R.Co. v. Ry. Clerks 281 U.S. 548, a statutory prohibition may never be

disregarded. From page 568:

> "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded."

The determination of the BSA granting such a variance to Kimball was not voidable but absolutely void, having been made without jurisdiction, in utter disregard of an express statutory prohibition.

A void judgment, void for lack of jurisdiction can never be a bar to subsequent litigation on any theory, and may always be reviewed in a Federal Court (Points IV and V of Appellants' principal brief).

This is fundamental law, upheld not only by the highest Court of the State but by the Supreme Court of the United States.

A void judgment is a nullity. It is effective for nothing, nor does the Appellate Division's erroneous attempt to give it validity in its March 1, 1976 (59A thru 62A) and again in its April 27, 1976 (64A, 65A) decision, make it valid.

Nor does even the fact that plaintiffs on three occasions abortively and mistakenly attempted to appeal to the Court of Appeals give it validity. Nothing can give validity to a void determination of an administrative tribunal or a judgment of a Court made without jurisdiction.

None of the Appellees have even attempted to answer this point of law or to cite even a single case, for they cannot, in an effort to show that the Board of Standards and Appeals had the

power to create a multiple dwelling out of a wooden frame building which had lost its converted standing and had reverted to its original single family status. Nor have the Appellees cited one single case where a plaintiff was precluded from raising the issue of lack of jurisdiction to make the determination or judgment, which was being pleaded as a bar in a subsequent action, simply because the litigants averring lack of jurisdiction had attempted unsuccessfully to appeal from the void judgment.

In one of the leading cases on the subject, Baltimore Mail S.S. Co. v. Fawcett, 269 N.Y. 379, 199 N.E. 628, the plaintiff appealed an erroneous assumption of jurisdiction to the Appellate Division. Jurisdiction was affirmed. He then tried to go to the Court of Appeals. He was denied. He then sought a writ of prohibition to stay the judgment - denied again. He took that denial to the Appellate Division - again denied. He then appealed again to the Court of Appeals. This time his voice, crying in an apparent wilderness, and now for the first time, was finally heard and the Court took cognizance of the fact that the judgment averring a jurisdiction which was non-existant, was absolutely void. It was there held, in the opinion of Judge Lehman, that a court cannot acquire jurisdiction by erroneously deciding it has jurisdiction, and that a void decision, void for lack of jurisdiction has no conclusive effect whatsoever, that one aggrieved by such a decision may continue to seek relief until he finds it and may resort to extraordinary measures where ordinary ones have been exhausted, and that he is not bound to seek direct appeal by certiorari to the Supreme Court of the United States,

but may raise the issue collaterally.

That case is directly in point with the case at bar.

Having failed in the State Courts to get relief from the void judgment, plaintiffs have now come to the Federal Courts, which is their right.

In the more recent case of Friedman v. State of New York, 24 N.Y.2d 528, the Court of Appeals of New York reiterated the same principle. From the opinion of Judge Scileppi, page 536:

> "Nor do we think that the Court of Claims was correct in stating broadly that a court's determination sustaining jurisdiction against attack is res judicata in a collateral action. This is true only in a case where jurisdiction depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction. Where, however, as in this case, a court's determination as to subject matter jurisdiction is a mere legal conclusion, the want of jurisdiction to render the particular judgment may always be asserted and raised directly or collaterally."

Judge Scileppi then goes on to cite the case of O'Donoghue v. Boies 159 N.Y. 87, 100, 53 N.E. 537, 540, and the case of Baltimore Mail SS Co v. Fawcwtt, supra, and to note that if the rule were otherwise a court could acquire jurisdiction by the mere erroneous assertion that it has jurisdiction.

In one of the earliest New York cases, Kamp v. Kamp 59 N.Y. 212, in discussing the power of one court to vacate or annul the action of another judge, the court held that in the case of void judgments held (p. 217) that the question of jurisdiction could be raised in a collateral proceeding to vacate the action of another judge.

But appellants' case has been made even stronger by what transpired after the March 1, 1976 decision of the Appellate Division confirming the Board's determination.

When the Article 78 proceeding was transferred to the Appellate Division pursuant to the provisions of the N.Y. CPLR Article 78 (this is an original proceeding for review of action by an administrative tribunal and not an appeal) it was then heard and decided by a panel on which, unbeknownst to petitioners at the time, a disqualified judge had sat.

Under New York law, the participation in or even the mere sitting in on a case without actual participation therein by a disqualified judge, makes the decision of that panel, absolutely void (point VII of appellants' principal brief). The fact that the Appellate Division treated petitioners' motion in the Article 78 proceeding to vacate the void decision, as a motion for re-argument, and then, Judge Latham still sitting, but nor voting, adhered to its original decision, does not give validity to the void decision. Both the decisions of the Appellate Division, dated March 1, 1976 and April 27, 1976, under New York Law are equally void and not voidable.

Again, none of the Appellees cite any statutory law or even a single case to refute the fact that these decisions are void.

In appellants' principal brief, their attorney, has conceded that she was then in error when she attempted to appeal further to the Court of Appeals from these void decisions rendered in an Article 78 proceeding on matters not in the record of the hearing before the Board of Standards and Appeals, which the Court of Appeals had no power to consider. (Points VIII and IX & X of appellants' principal brief).

It is admitted that a separate proceeding or an action in equity to set aside the void orders or decisions could have been brought

if desired, although plaintiffs were under no obligation to do so. But the error in choice of remedies does not and cannot give validity to a void decision.

Appellants have not come up with a single citation to refute these points of law.

POINT II

THE DISTRICT COURT ERRED IN FAILING TO CONSIDER AND EXAMINE THE ISSUE RAISED BY APPELLANTS THAT THE ORDERS AND JUDGMENT ON WHICH DEFENDANTS BASED THEIR CLAIMS OF RES JUDICATA AND COLLATERAL ESTOPPEL WERE VOID FOR LACK OF JURISDICTION TO RENDER SAME

It is obvious from a reading of the District Court's opinion, (41 A through 53 A) that the Court below paid little if any attention to the issue of lack of jurisdiction to make the orders and judgment with which defendants were trying to defeat plaintiffs' action on the ground of collateral estopple, res judicata etc., but instead took those orders and judgment at face value. It has been this writer's experience and the cases would seem to so indicate that when such an issue is raised, the Federal courts will most carefully examine the facts and ascertain, not only from the record but from extraneous proof and by hearing, if necessary, whether the tribunal or court making the subject orders and/or judgment actually had the jurisdiction to do so. In the case at bar the Court below never even held oral argument on the motions to dismiss.

The very language used by the Court below in its opinion indicates that the issue of jurisdiction was never really examined by the Court.

The District Court in its opinion, calls plaintiffs' pursuit of relief in the state courts "relentless" (51A) and their bringing of the instant civil rights action "a blunt and unnecessary affront to the state legal system" and "frivolous".

There is no basis in law or fact for such characterization of plaintiffs' actions in seeking to protect their homes and property against unwarranted and illegal devaluation and their neighborhoods from deterioration. That this is a valuable right has been time and again reiterated by the Supreme Court of the United States.

In the State courts, plaintiffs did no more than the law allows in any litigation.

When the Appellate Division in the Article 78 proceeding by unanimous decision confirmed the determination of the Board of Standards and Appeals (which itself had not been a unanimous decision, the one lawyer on the board voting against the determination) petitioners followed standard practice in trying to go to the Court of Appeals. Believing they had constitutional grounds, they filed a notice of appeal as of right. When this was dismissed, they did what the law provides in cases of such error. They timely made a motion for leave to appeal. Sec. 5514 of the CPLR provides that if an appeal taken on alleged constitutional grounds is dismissed, an appellant may move for leave to appeal within thirty days from the order of dismissal. That lawyers frequently make such errors is obvious from the fact that such a provision has been written into the law.

Then, and it is admitted, again mistakenly, petitioners' attorney filed a notice of appeal on constitutional grounds from the

second order of the Appellate Division, dated April 27, 1976 which granted petitioners' motion to vacate the order of March 1, 1977 to the extent of treating it as a motion for re-argument, (which petitioners' had not sought) and on reargument adhered to the original decision, Judge Latham, the disqualified judge, again sitting, but not voting.

If petitioners' attorney made the mistake of believing that the issue of Judge Latham's disqualification could be reviewed by the Court of Appeals in the Article 78 proceeding on the additional papers extraneous to the record of proceedings before the Board of Standards and Appeals (a mistake frequently made by lawyers as the cases cited in Point VIII of appellants' principal brief indicate) should the petitioners, appellants herein be so castigated?

Is it an affront to the State legal system that petitioners then sought in the Federal Courts the relief from a void judgment to which they are entitled?

If such actions are an affront to a state legal system, then no litigant would have a right to use the avenues the law provides for the redress of grievances. Courts are held by judges. Judges are human beings and human beings make mistakes. Litigants have a right to seek to correct by whatever avenues are available what they believe are errors, without being accused of reprehensible conduct.

The Civil Rights laws were passed just for such purposes. Plaintiffs were and are not obligated to bring an equity action in the state court before resort to the Federal court. As was stated in Monroe v. Pape 365 U.S. 167, 81 S.Ct. 473, at page 183:

> "(b) One of the purposes of this legislation was to afford a federal right in federal courts because, by

reason of prejudice, passion, neglect or otherwise, state laws might not be enforced and immunities guaranteed by the Fourteenth amendment might be denied by state agencies.

(c) The federal remedy is supplemental to the state remedy and state remedy need not be sought and refused before federal remedy is invoked."

The principles of res judicata, collateral estoppel and issue preclusion should not be rigidly applied in civil rights cases. Tipler v. E. I. du Pont de Nemours and Co. 443 F. 2d 125.

In Lombard v. Board of Ed 502 Fed 2d 631 and Newman v. Board of Ed. 508 Fed 2d 277, the plaintiffs had vainly, as in the case at bar, sought appeal to the Court of Appeals of New York. This court has held in both those cases that the prior litigation and attempted appeals were no bar to the Federal Civil rights actions. Even in those cases where civil rights actions were dismissed as barred by the prior state court litigation, plaintiffs were not criticised as having affronted the state legal system.

BRIEF OF APPELLEES, KIMBALL

Much of the Kimball brief is taken up with a recitation of facts which were important in the initial litigation to vacate the illegal building permit on the issue of whether or not the subject premises was a multiple dwelling when Kimball bought it. But that issue was finally and for all time resolved by the Appellate Division decision of April 29, 1974 and cannot be relitigated. There would seem to be no purpose for such a recitation except possibly the vain hope that somehow this Court would be convinced that the building had, despite the resolution of that issue, retained its multiple status.

The brief also terms plaintiffs' application at Special term to set aside the void Appellate Division decision, "ludicrous". That was concededly an error not because it was brought at Special Term but because it was brought in the Article 78 proceeding. The law holds that any judge even a lower court judge may set aside and vacate a void decision of a higher court where there was no jurisdiction.

In the case of Seaward v. Tasker 143 N.Y.S. 257, cited at page 25, 27 of appellants' principal brief, a judge at Special Term did precisely that, set aside an affirmance by the Appellate Division, Second department of a prior judgment as absolutely void on the ground that it had been participated in by a judge who should have disqualified himself.

In the case of Kamp v. Kamp 59 N.Y. 212, supra, the Court of Appeals held that any judge may vacate and set aside a void order or judgment made by another judge.

In the case of Elmira Realty Co. v. Gibson 103 App. Div. 140, the Court held that where a judgment appealed from is void for want of jurisdiction, the better practice is to dismiss the appeal, remitting the parties to the court below to rid themselves if need be of the judgment, rather than grant reversal.

The case of People ex rel Union Bag & Paper Corp. et al v. Gilbert et al 143 Misc. Rep. 287, 256 N.Y.S. 442, following the Elmira case held that it was proper practice to go to Special Term before another judge to annul void proceedings.

The Kimball brief cites a number of civil rights cases in which the Federal Court refused to take jurisdiction on the ground

of res judicata. Those cases have no bearing on the case at bar. None of them involved a void judgment and/or a disqualified judge. The Kimball brief also cites the case of Overmeyer v. Fidelity and Deposit Co. of Maryland, decided by this Court May 3, 1977, where the appellants were assessed double costs and $2000. for legal fees. What bearing can that case possibly have upon the case at bar. In that case appellants sought to frustrate the collection of a valid money judgment. In the case at bar, the Belle Harbor Property Owners, Ass. has paid on behalf of the named plaintiffs all judgments and costs of the prior litigation regardless of the invalidity.

The appellees, Kimball, complain that they have been and are being harassed and have lost money because of plaintiffs' actions, as though plaintiffs had deprived them of something to which they had an absolute right, willfully forgetting and ignoring the fact that the variance they received was not a matter of right but of favor, that to date they have been successful in imposing an ugly illegal and dangerous building upon their neighbors to their neighbors' detriment, that they have installed tenants in the building and are collecting rents; that they installed tenants in the building and collected rents long before they even received a certificate of occupancy, subsequently revoked, and illegally kept tenants in the building and collected rents even after the revocation.

The Kimballs obtained the variance, not as a matter of right, but favor, out of pity for their allegations of hardship and financial disaster, brought on by their own mistakes. Now they want their neighbors whose rights they have violated, to pay for the Kimball's

mistakes by permitting deterioration of the neighborhood, and would even seek reparations because their neighbors have dared to sue to protect those rights.

In their brief, the Kimballs also time and again accuse plaintiffs of making false allegations in the complaint, but do not point out even one allegation that they claim is false.

In their brief, pages 11 and 12, the Kimballs list some 12 exhibits, marked "D" through "O". After that brief was served another paper was served by the Kimballs by mail termed "NOTICE DESIGNATING EXHIBITS". This paper lists what purport to be 17 exhibits from "A" through "Q". Five of those exhibits "A", "B", "C", "I" and "M" have already been reprinted in full in the joint appendix at pages 57A, 64A, 67A, 63A, and 66A respectively. One of the exhibits, called "P" though not in the joint appendix, is in the Original Record of the District Court, Document number 15. Exhibit Q is a paper filed with this Court. Part of Exhibit "J" is attached to the original motion papers to dismiss brought by the City for the municipal defendants. None of the other exhibits appear anywhere in the original record, and on information and belief were never submitted to the Court below, except that two of them may have been attached to papers which may have been submitted to the Court below but never filed in the Clerk's office, Exhibits "D" & "N".

The rules of this court forbid inclusion in the record on appeal of any papers not filed in the Court below. Since none of these papers which these appellees would now bring before the Court

have any bearing on the issue of the lack of jurisdiction in the BSA and the Appellate Division to make the determination and orders with which the appellees are seeking to bar the instant action on the ground of res judicata, it is difficult to understand for what purpose as well as by what authority these appellees now propose to introduce these documents, unless it is just to clutter the record and hope for confusion.

THE BRIEF OF THE MUNICIPAL DEFENDANTS

The brief submitted by the corporation counsel on behalf of the municipal defendants, falls into the same error, failing to distinguish between a void and voidable judgment, and does not address itself or refute any of the points of law relative to the issue of jurisdiction. It quotes at length from the opinion of the District Court which has been reprinted in full in the joint appendix (41A through 53A).

These appellees also raise a new point, not heretofore appearing as to the identity of parties in the action at bar and the prior actions in the state courts.

Plaintiffs brought this action as a class action. While it is true that the District Court never passed on whether or not it was a true class action pursuant to Rule 23, and the defendants assumed the risk of subsequent suits by other class members by moving for summary judgment prior to such determination should judgment be in their favor, Roberts v. American Airlines Inc. 526 Fed. 2d 757, that issue is not paramount, for the orders attacked are absolutely void for lack of jurisdiction, whether on an individual or class basis. It would seem that instead of worrying about possible

additional lawsuits by other class members, they should worry about lawsuits by persons who may be injured should a fire break out in this illegal fire-trap building, for the lack of jurisdiction to have permitted a multiple dwelling in this frame building would surely be then raised and not only the Kimballs but the city held responsible.

These appellants admit, even argue, that the first decision, of the Appellate Division dated April 29, 1974, is final and binding, and then go on to talk about the preclusion of the plaintiffs to relitigate the issues laid to rest in that case. Plaintiffs are very happy with that decision and would not want to relitigate it, if they could. The argument that appellants are trying to re-litigate the issues in that decision is so patently erroneous, as even a cursory reading of plaintiffs' first cause of action shows (4A through 17A) that the matter deserves little further attention.

On page 22 of their brief, these appellees argue that even if the constitutional claims were improperly raised in an Article 78 proceeding, that the New York Court of Appeals has held that by the simple expedient of treating the proceeding as an action for declaratory judgment the constitutional claims could be adjudicated, and then cite the case of Kovarksy v. Housing & Development Administration 31 N.Y. 2d 184, but leave out the essential proviso in that decision to wit, that all necessary parties must be before the Court if it were to do so. In that case the Court held, p. 387:

> "We have consistently held that a proceeding under article 78 is not the proper vehicle to test the constitutionality of legislative enactments *****"

and then went on to rule that since all the proper parties were before the court, the matter could be treated as an action for declaratory judgment.

In the case at bar, these same defendants, in their reply affidavit in support of their motion to dismiss raised the issue that plaintiffs' fourth cause of action would not lie because all the proper parties were not before the court and this has been conceded by the plaintiffs. Obviously then the matter could not be treated as one for declaratory judgment. Furthermore it was not so treated as the decisions show, for had it been treated as an action for a declaratory judgment, the Court would have had to render a decision or declaration on the issue, for the cases hold that even where at first glance there would seem to be little merit to an action for declaratory judgment, the courts should not dismiss even if plaintiffs were not entitled to the declaration sought but take jurisdiction and give judgment. Lanza v. Wagner, 11 N.Y. 2d 317, 229 N.Y.S.2d 380, 183 N.E. 2d 670, 97 AIR 3rd 344 and other cases cited at page 40 of appellants' principal brief. The Federal courts hold likewise, Wall v. Am. Optometric Ass. Inc. 379 F. Supp. 175, affirmed 419 U.S. 288.

THE ATTORNEY GENERAL'S BRIEF

The brief submitted on behalf of the judges herein, likewise fails to distinguish between a void and a voidable judgment, between an adjudication by a court of its own jurisdiction based on a contested question of fact and an adjudication based on a mere conclusion of law that it has jurisdiction, where in fact it had none. That point has

been more than adequately briefed.

It is also argued that the complaint fails to state a claim notwithstanding res judicata, because, it is alleged that plaintiffs are seeking the nullification of a discretionary decision of a state agency to grant a variance.

This statement is simply not in accord with the facts. Had the subject building been a brick edifice, the BSA would have had the discretionary power to grant a variance. But in the case of a wooden frame building, ruled by the Appellate Division itself to be a single family frame building, the BSA had absolutely no discretion, for it is forbidden by statute to vary the provisions of the New York State Multiple Dwelling Law and the Multiple dwelling law forbids more than two families in a wooden frame building. There is no question of discretion in such a case. The prohibition is absolute and the variance void.

THE BRIEF OF APPELLEES, RICHMOND HILL SAVINGS BANK AND JULIUS GRANIRER.

Although these defendants, aside from their interference and/or intervention in the proceeding for a variance before the Board of Standards and Appeals have never been sued or involved in any of the prior litigation, they would also claim the benefit of alleged res judicata and collateral estoppel on the basis of the actions to which they were not party. If those defenses fail for the parties in the prior litigation they must surely fail for non-parties.

In the proceedings in the District Court, these defendants

sought dismissal of the complaint, before answer and without affidavit, relying on the complaint itself. When plaintiffs moved for summary judgment, they were forced to oppose with affidavits. Now although plaintiffs' motion for summary judgment was denied, they seek to make those opposing affidavits part of the record on appeal by submitting a belated supplemental appendix including them.

The affidavits can avail them nothing. By now insisting on using the affidavits they are in effect admitting that standing by itself, the complaint is sufficient. Whatever factual allegations in the complaint, they would or do deny by these affidavits cannot be resolved summarily, for the law does not permit contested matters to be disposed of on such motions to dismiss before answer and before trial.

Trial by affidavit of issues of fact without evidentiary hearing is prohibited by law, and all reasonable inferences of fact must be drawn in favor of the party opposing summary judgment or dismissal, Rhoads v. McFerran 517 Fed. 2d 66.

Pleadings must be liberally construed in favor of party opposing summary judgment. Stevens v. Barnard 512 Fed 2d 876.

On such motions plaintiffs allegations are to be taken as true and all reasonable inferences arising therefrom are to be indulged. The motion to dismiss may not be sustained unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim set forth by plaintiff. The Court of Appeals would not attempt to resolve any conflict in inferences which on such a motion must be resolved in plaintiffs favor. Callaway v. Hamilton National Bank of Washington

195 Fed 2d 556.

A complaint when tested by summary proceeding must be given benefit of every possible implication. Schaefer v. First National Bank 509 Fed. 2d 1287.

In view of the law prohibiting trial by affidavit it would be a fruitless waste of time for plaintiffs to even attempt to rebut all the sworn denials in the affidavits, of facts alleged in the complaint.

Plaintiffs merely wish at this stage to call to the attention of the Court, some errors in the law and discrepancies in the argument in the brief.

It is argued that Mr. Granirer had a right to represent both the bank and the borrower from the bank, that lawyers may represent both sides in a matter where there is consent of both parties and full disclosure. That is correct if Mr. Granirer were merely the bank's lawyer. But Mr. Granirer wore two hats in this matter. He was not only the lawyer for the bank, but he was also a trustee of that bank and as such is forbidden by law to also represent a borrower from his bank. As our Supreme Court has ruled an express prohibition in a statute cannot be disregarded.

It is also argued that the plaintiffs may not sue for such an infraction of the law. The plaintiffs are not suing for the infraction. That fact is alleged to show the motive behind the intervention by these defendants in the variance proceeding and their connection with the conspiracy to obtain a forbidden variance for Kimball, in an effort to cover up their own misfeasance.

The cases cited to defend what Mr. Granirer did and with the consent of the bank, are all cases where a lawyer for the bank represented the borrower also, but none of those cases indicate that the lawyer was also a trustee of that bank.

That even the slightest participation in a conspiracy may impose liability is too well established law to need citation.

The argument is also made that the bank "had refused to favor and succor defendant, Kimball, by financing said conversion of the property" (page 6 of the brief), but the letter (119A and 120A) states that the additional loan to finance the conversion was granted on condition that a certificate of occupancy be obtained.

The bank also makes claim that it was not asking for a favorable consideration of the variance when it sent the ex parte letter to the BSA, that it was merely stating the fact that the security of the mortgage would be substantially impaired. It is difficult to understand what other inference could possibly be reasonably drawn from such a statement, other than that it wanted the variance granted especially in view of the fact that the bank also insists that it was protecting its interests when it sent the letter.

There are other discrepancies in the argument, but since neither argument nor affidavit can resolve factual issue raised by the complaint, it is patently totally unnecessary to delve further. We wish only to make one other observation.

The defendants ask this Court to award them double costs and legal fees and cite the Overmeyer v. Fidelity and Deposit Company of Maryland decided by this Court on May 3, 1977 as alleged authority for that request.

We confess a failure to see any analogy between that case and the case at bar, nor have we found any authority anywhere for punitive action against plaintiffs for merely bringing an action based in civil rights for the first time against defendants never before sued, on a motion to dismiss before answer and before any evidentiary hearing.

CONCLUSION

THE JUDGMENT AND ORDER OF THE DISTRICT COURT SHOULD BE REVERSED IN ALL RESPECTS.

Respectfully submitted,

DORA ABERLIN
Attorney for Plaintiffs-Appellants

ABERLIN

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 2 day of August 1977 deponent served the within Reply Brief upon

Hon. W. Bernard Richland, Corp. Counsel,
Hon. Louis J. Lefkowitz, Atty. General,
Sheldon Lobel, Esq. and
Frey & Harkow, Esqs.

attorney(s) for

Appellees

in this action, at

Municipal Building, NYC, 2 World Trade Center, NYC 10047, 60-10 Roosevelt Ave., Woodside, NY 11377 and 90-04 161st St., Jamaica, NY 11432 respectively

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 2 day of August, 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978